less important, is the leading role the United States played in securing these essential protections. Both the Convention and the Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol)[4] are substantially the product of U.S. leadership.

The Convention codified the pre-existing law on consular relations between States, an area that had previously been regulated "mainly by bilateral agreements or other less formal arrangements and by national laws."[5] In that respect, the Convention brought unity to this multiplicity by forging a single, global agreement on consular relations, thereby "contribut[ing] to the promotion of friendly relations between nations."[6] The United States actively participated in creating this agreement, and took a substantial part in

---

174 ("A principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."); U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, January 1, 2001, *available at* http://www.state.gov/s/l/16139.htm ("Consular notification of and access to a detained or arrested U.S. citizen has long been crucial to providing basic protective services abroad.... Protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas.")

[4] April 24, 1963, 21 U.S.T. 325, 596 UNTS 487.

[5] Report of the United States Delegation to the United Nations Conference on Consular Relations, Vienna, Austria, March 4 to April 22, 1963, reprinted in S. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at 41 (hereinafter "Report").

[6] *Id.*

drafting Article 36, the text of which was agreed to "after much debate."[7]

Significantly, the provision of consular assistance under Article 36 depends at the outset on the detained individual's notice right. As the Report of the U.S. Delegation to the United Nations Conference on Consular Relations notes, Article 36(1)(b) requires that "[arresting] authorities shall inform the person concerned without delay of his rights under this sub-paragraph."[8] The Conference described this requirement as "not beyond means of practical implementation in the United States, and, at the same time, is useful to the consular service of the United States in the protection of our citizens abroad."[9]

While the Convention represents an important codification of the obligation to provide consular notification, the United States has recognized that consular notification, beginning with notice to the detained individual, is not dependent upon the legal protections of the Convention alone:

> Consular notification is in our view a universally accepted, basic obligation that should be extended even to foreign nationals who do not benefit from the VCCR or from any other applicable bilateral agreement. Thus, *in all cases, the minimum requirements are to*

---

[7] *Id.* at 59.

[8] Convention, art. 36(1)(a).

[9] Report at 60. Elsewhere, the Report notes that "[t]he standard of treatment required by the present Convention conforms in all essential respects to the views of the United States as to what is or should be required by international law and practice." *Id.* at 74.

> *notify a foreign national who is arrested or detained that the national's consular officials may be notified upon request; to so notify consular officials if requested; and to permit consular officials to provide consular assistance if they wish to do so.*[10]

In addition to providing leadership in codifying consular rights and obligations in the Convention, the United States played an integral role in drafting the Optional Protocol, which provides in relevant part that any "[d]isputes arising out of the interpretation or application of the Convention *shall* lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the Present Protocol."[11] Indeed, this language derives substantially from the original proposal of the United States, which provided that "[a]ny dispute arising from the interpretation or application of this Convention shall be submitted at the request of either of the parties to the International Court of Justice unless an alternative method of settlement is agreed upon."[12] At the Conference, the United States voted *against* a motion by the Yugoslav delegation that would have weakened the

---

[10] Bureau of Consular Affairs, U.S. Department of State, Consular Notification and Access, Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them 44 (no date of publication available; "[t]he Department of State expects to update [the publication] every 2-5 years"), *available at* http://travel.state.gov/law/consular/consular_744.html (emphasis added).

[11] Protocol, art. 1 (emphasis added).

[12] Report at 72.

compulsory jurisdiction of the ICJ.[13] While the final language of the Protocol is slightly different than the language proposed by the United States, it clearly provides for the compulsory jurisdiction of the ICJ, precisely as urged by the United States.

That the United States would have argued so assiduously for an Optional Protocol that provided for the compulsory jurisdiction of the ICJ should come as no surprise. the United States has been involved in more cases at the ICJ than any other nation in the world, and has invoked the jurisdiction of the World Court more often than any other State.[14] Two such actions, however, are of particular interest to *amici*.

On November 19, 1951, a C-47 cargo aircraft of the 85th Air Depot Wing of the U.S. Air Force carrying four American airmen was making a routine flight from Erding Air Force Base in Germany to Belgrade, Yugoslavia. During the flight, the plane accidentally crossed into Hungarian airspace and was "brought down by Soviet authorities in Hungary and subsequently turned over with its crew to Hungarian authorities."[15] American authorities searched in

---

[13] The Yugoslav delegation proposed adding a paragraph to the U.S. proposal, providing that "[a]ny contracting party may, at the time of signing or ratifying this Convention or of acceding thereto, declare that it does not consider itself bound by paragraph 1, of this article [the United States proposal]. The other contracting parties shall not be bound by the said paragraph with respect to any contracting party which has formulated such a reservation." *Id.* at 73.

[14] The official website for the ICJ lists all cases from 1946 to the present. *See* http://www.icj-cij.org/icjwww/idecisions.htm (last visited Dec. 21, 2005).

[15] Press Release, United States Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident (Dec. 10, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

vain for the missing fliers until December 2, 1951, when Russia's *Tass* news agency revealed that the aircraft and its crew had been in Hungarian and Soviet custody since its disappearance.[16] Although U.S. State Department officials immediately sought the release of the fliers, Hungarian officials would not permit it, nor, despite repeated requests, would they let American officials speak with the men.[17]

On December 23, 1951, Hungary announced that the four men had been tried by a Hungarian military court and sentenced to a fine of almost $30,000 each, or three months imprisonment, for "intentionally violating the Hungarian border."[18] "The trial was secret, and the United States was

---

[16] *Budapest v. U.S.*, N.Y. Times, Dec. 9, 1951, at 168 *available at* http://www.il.proquest.com/proquest/ (ProQuest Historical Newspapers, N.Y. Times (1851-2000)); *see also, U.S. Promises Action to Free Seized Fliers*, Washington Post, Dec. 4, 1951, at 1, *available at* http://www.il.proquest.com/proquest/(ProQuest Historical Newspapers, Washington Post (1877-1988)):

> Also expected is a protest over the fact that the Communist authorities kept silent for nearly two weeks while search planes combed Yugoslavia... Press Officer Lincoln White said at the State Department that the Soviet charges are 'apparently a cover-up for the fact that despite repeated representations by the American Chargé d'Affaires at Budapest, George Abbott, requesting information concerning the plane, the Hungarian authorities repeatedly said they had no information.

[17] Press Release, U.S. Department of State, U.S. Seeks Release of American Fliers Held in Hungary (Dec. 28, 1951), *in* 26 Department of State Bulletin 7 (1952).

[18] *U.S. Air Crew Fined, Hungarian Border "Violation," 30,000 Dollars Each*, London Times, Dec. 24, 1951, at 4, *available at* http://www.galegroup.com/Times/ (Times of London Digital Archive, 1785-1985).

given no opportunity to be present through any representative...."[19] In a speech given to the United Nations the following year, Senator and U.S. Representative to the General Assembly Theodore Green observed:

> What concerns us most here is the stubborn and implacable manner in which both Soviet and Hungarian officials refused U.S. representatives' repeated requests for access to the airmen. Not only this, but both our diplomats and the airmen were prevented from obtaining their own legal counsel in the trial which took place.[20]

Hungary released the American airmen on December 28, 1951. Upon their release, the United States promptly closed the Hungarian consulates in New York and Cleveland and barred Americans from traveling to Hungary.[21] Secretary of State Dean Acheson placed the blame for this retaliation squarely upon Hungary's failure to "live up to the accepted standards of international practice with regard to

---

[19] Press Release, U.S. Department of State, U.S. Asks Return of Property Seized in 1951 Plane Incident (Dec. 19, 1952), *in* 27 Department of State Bulletin 980, 980-84 (1952).

[20] Statement by Senator Theodore F. Green, U.S. Representative to the General Assembly, United States Department of State, Soviet Harassment of Foreign Diplomats (Oct. 29, 1952), *in* 27 Department of State Bulletin 787 (1952).

[21] Press Release, U.S. Department of State, U.S. Orders Closing of Hungarian Consulates (Dec. 29, 1951), *in* 26 Department of State Bulletin 7 (1952).

the right of consular officers to exercise protective functions in behalf of nationals of their country."[22]

The incident also provided the occasion for this country's first litigation in the World Court. On March 17, 1954, the United States initiated proceedings at the ICJ against Hungary and the Soviet Union, claiming the failure to allow consular access and assistance had deprived the United States and its citizens of their respective rights to provide and receive consular assistance. "International law," the United States correctly observed, "recognizes the right of the government in such matters to act on behalf of its nationals and is applied in Hungarian judicial practice."[23]

Significantly, the cases against Hungary and the Soviet Union could not proceed because those countries refused to accept the World Court's jurisdiction. Upon the removal of the case from the ICJ's docket, the United States lamented:

> This conduct on the part of the two defendant Governments merely demonstrates again that they have no compunctions in publicly asserting principles of international law and order but in then refusing to permit those principles to be applied to their own conduct. *The U.S. Government must of course accept*

---

[22] Press Release, U.S. Department of State, Statement by Secretary Acheson (Dec. 28, 1951), *in* 26 Department of State Bulletin 7 (1952).

[23] Application Instituting Proceedings and Pleadings (U.S. v. Hungary; U.S. v. U.S.S.R.), 1953 I.C.J. Pleadings, (*Treatment in Hungary of Aircraft and Crew of United States of America*) Annex I at 36 (Feb. 16, 1954).

the decision of the International Court of Justice.[24]

The United States again turned to the ICJ in 1979 when it submitted an application instituting proceedings against the Islamic Republic of Iran "concerning the seizure and holding as hostages of members of the United States diplomatic and consular staff and certain other United States nationals."[25] In its application, the United States accused Iran of several treaty violations, including violations of Article 36 of the Convention, and requested that the ICJ "adjudge and declare" that Iran was under a "particular obligation immediately to secure the release of all United States nationals currently being detained."[26] The ICJ indicated provisional measures to be taken by Iran on December 15, 1979, and entered a final judgment in favor of the United States on May 24, 1980. Thereafter, the United States insisted the decisions of the ICJ were binding in all respects, and that Iran must comply with the Court's judgment.[27]

The significance that the United States has attached to the jurisdiction and authority of the ICJ is particularly

---

[24] Press Release, U.S. Department of State, U.S. Applications in C-47 Case Removed From Calendar of ICJ (July 16, 1954), *in* 31 Department of State Bulletin 130 (1954) (emphasis added).

[25] *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S.A. v. Iran)*, 1980 I.C.J. 3 (Judgment of 24 May).

[26] *Id.* at 6.

[27] *U.S. Urges the Iranians to Obey Court Decision*, N.Y. Times, May 25, 1980, pg. 9: "The State Department said today that the decision by the International Court of Justice ordering Iran to release the American hostages and pay compensation to the United States was binding on Iran, and it called on the Teheran Government to carry out its provisions."

relevant here, as that Court, in its *Avena* Judgment, declared that Article 36 confers upon foreign detainees an individual legal right to be notified of the right to inform their consulates of their arrest and to have any communication to their consuls forwarded without delay.[28] The ICJ further declared that U.S. violations of Article 36 should be given effect in judicial proceedings.[29]

In sum, the United States' prominent role in drafting the Convention, including Article 36, its leadership in

---

[28] *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), ¶¶ 40 (citing *LaGrand* (Ger. v. U.S.), 2001 I.C.J. 494), 61 & 106(1).

[29] *Id.*, ¶¶ 113-14, 121, 140-41. *See also id.* ¶ 151 ("To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention .... In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.").

The United States' withdrawal from the compulsory jurisdiction of the ICJ in no way lessens the weight of this ruling. The United States has not suggested that the ICJ was not properly exercising its jurisdiction in issuing the *Avena* Judgment and, indeed, has affirmatively indicated that it intends to comply with that judgment. *See* Press Statement by Adam Ereli, Deputy Spokesman, U.S. Department of State (Mar. 10, 2005) ("we remain a party to the Vienna Convention, we remain committed to fulfilling its provisions and we stand by it.... in recognition of the optional protocol and our international commitments, the President has determined that the United States will comply with the judgment of the International Court of Justice."); *see also Jogi v. Voges*, 425 F.3d 367, 383-84 (7th Cir. Sept. 27, 2005) (withdrawal from the Optional Protocol is a prospective action only, with "no effect on disputes that were tendered to and finally decided by the ICJ before the withdrawal.").

establishing the compulsory jurisdiction of the ICJ, and its frequent resort to the ICJ's jurisdiction all counsel a result here that is consistent with the ICJ's judgment. The individual notice right and other rights set out in Article 36 should be enforceable in the courts of this country.

II.

Failure To Provide Vigorous And Robust Enforcement Of The Vienna Convention Could Have Grave Consequences For U.S. Citizens Abroad

The integrity of the international legal system, which has no independent enforcement mechanism, depends on the acceptance of mutual obligation. Behind this acceptance is the essential lesson of diplomatic experience: so long as they are able, nations will respond in kind to the treatment they receive. Reciprocity is thus an inescapable necessity and the bedrock that underlies the foundational principle of international law – *pacta sunt servanda* ("pacts must be respected") – that nations must honor their agreements in good faith.[30] In matters both mundane and monumental, membership in the international community implies a solemn obligation to comply with treaties in good faith, "undertaking to do (or not to do) unto others what they would have done (or not done) unto them."[31]

In the present context, the importance of reciprocity cannot be overstated. Over the last 30 years, the number of Americans living overseas has increased dramatically. The

---

[30] *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 321 cmt. a (1987) (*pacta sunt servanda* "lies at the core of the law of international agreements and is perhaps the most important principle of international law.")

[31] Louis Henkin, *How Nations Behave* 30 (2d ed. 1979).

State Department now estimates that "[a]pproximately 3.2 million Americans reside abroad, and Americans make about 60 million trips outside the United States each year."[32] The State Department also reports that over 2,500 Americans are arrested abroad annually.[33] And this total does not include the number of citizens detained outside the formal criminal justice process. All told, roughly 6,000 Americans are arrested or detained abroad every year.[34] The largest number of these – 400 – are detained in Mexico, home country of petitioner Sanchez-Llamas.[35]

These statistics demonstrate that many U.S. citizens, at one time or another, will find themselves overseas in need of legal help, and they teach that a failure to provide foreign nationals in the United States with vigorous and robust enforcement of the Vienna Convention could have grave consequences for U.S. citizens abroad. As U.S. jurist Stephen M. Schwebel, President of the International Court of

---

[32] Bureau of Resource Management, U.S. Department of State, *FY 2003 Performance and Accountability Report* (2003), *available at* http://www.state.gov/m/rm/rls/perfrpt/2003/html/29037.htm

[33] Office of Overseas Citizens Services, Bureau of Consular Affairs, U.S. Department of State, Department of State Publication 10252, *Overseas Citizens Services*, (2002), *available at* www.international benefits.com/travel-tips/overseas-citizens-services.htm.

[34] Kevin Herbert, *The Terrorist Threat to the American Presence Abroad: A Report of a Consultation of The Critical Incident Analysis Group and The Institute for Global Policy Research, Part II. 2. Threat to Citizens Overseas*, University of Virginia, April 12-13, 1999, *available at* www.healthsystem.virginia.edu/internet/ciag/reports/report_terr_citizens.cfm. (Kevin Herbert is from the Office of Overseas Citizens Services, U.S. Department of State).

[35] Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Apr. 15, 1998), *available at* www.hri.org/news/usa/std/1998/98-04-15.std.html.

Justice, stated of the requirements of Article 36, "the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States."[36]

This risk to U.S. citizens is a matter of persistent concern. The State Department Foreign Affairs Manual instructs American consuls abroad to secure "immediate [consular] notification, no matter what the language of applicable treaties legally requires."[37] Apart from ensuring the timely provision of legal information, prompt notification and access "is necessary to forestall physical abuse of the prisoner ... or to ascertain when such abuse has occurred."[38] American consuls are required to determine if there has been "any physical abuse or violation of rights"[39] and to look for signs of ill-treatment, bearing in mind that "many forms of physical abuse, including systematic torture, are calculated to leave no physical evidence."[40] Consular officers also arrange for detainees to be "examined by a private medical doctor to determine the extent and probable cause of any injury"[41] when appropriate and observe "the physical

---

[36] *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, I.C.J. Reports 1998, Order of 9 April, Declaration of President Schwebel.

[37] U.S. Department of State Foreign Affairs Manual (1984), 7 FAM 411.3, *Relations with Local Authorities*.

[38] *Id.*, 7 FAM 412, *Access*.

[39] *Id.*, 7 FAM 414.1, *Abuse of Prisoners*.

[40] *Id.*, 7 FAM 414.1-1, *Examination by an Officer*.

[41] *Id.*, 7 FAM 414.1-2, *Examination by Independent Physician in Cases of Abuse*.

conditions under which the prisoner is being held."[42] Finally, the consulate is required by law "to assist U.S. citizens abroad who, as a result of their incarceration, cannot secure the minimal medical treatment or dietary regimen necessary to sustain an acceptable standard of life."[43]

The State Department has repeatedly stressed to domestic officials the vital importance of reciprocal enforcement of the Convention. As Governor of Texas, George W. Bush received a letter from Secretary of State Madeleine Albright that noted:

> As Secretary of State, ensuring the protection of American citizens abroad – including over 300 imprisoned Texans last year – is one of my most important responsibilities. Our ability to provide such assistance is heavily dependent, however, on the extent to which foreign governments honor their consular notification obligations to us. At the same time, we must be prepared to accord other countries the same scrupulous observance of consular notification requirements that we expect them to accord the United States and its citizens abroad.[44]

On another occasion, Secretary Albright noted that the State Department stood ready to provide a range of assistance to Americans detained abroad, including

---

[42] *Id.*, 7 FAM 414.2, *Conditions of Detention.*

[43] *Id.*, 7 FAM 451, *General Policy (Emergency Medical and Dietary Assistance).*

[44] S. Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LJIL 367, 376 (2002) (quoting from Secretary Albright's letter to Governor Bush, dated November 27, 1998).

"attempting to ensure that they understand the foreign country's legal system and their legal options, by helping them obtain qualified legal representation, by communicating with their families if they wish, and by taking other steps to improve the prisoner's situation and in some cases, to influence the outcome of the proceedings."[45] She has also cautioned that non-compliance with the orders of the International Court of Justice "could be seen as a denial by the United States of the significance of international law and the court's processes in its international relations and thereby limit our ability to insure that Americans are protected when living or traveling abroad."[46]

U.S. consular officers overseas have been instructed to insist on scrupulous observance of Article 36 rights, in order to carry out their "primary mission" of protecting Americans:

> If we are to be effective in protecting the rights of U.S. citizens detained or otherwise in distress abroad, we must first know their situation and we must be vigilant in personally assisting them. By consistently protesting violations of notification and access obligations, we reinforce with the host government the seriousness with which we take our consular responsibilities and

---

[45] Letter from Madeleine Albright, Secretary of State, to Victor Rodriguez, Chairman of the Texas Board of Pardons and Parols, quoted in footnote 211 of the Memorial of Mexico, *Case Concerning Avena and Other Mexican Nationals*, I.C.J. Pleadings (2003), *available at* www.icj-cij.org/icjwww/idocket/imus/imusframe.htm.

[46] Linda Greenhouse, *Court Weighs Execution of Foreigner*, N.Y. Times, April 14, 1998, page 14 (quoting from Secretary Albright's letter to Virginia Governor James Gilmore).

> underscore our efforts to protect our citizens against any abuse, mistreatment or discrimination.[47]

Secretary Albright's position is neither surprising nor unusual. Other State Department officials have voiced the same sentiment.[48] Most recently, William H. Taft, IV, the Department's former Chief Legal Advisor, observed in a letter to the Oklahoma clemency officials presiding over the recent case of Osbaldo Torres, Article 36 of the Convention "is not only of importance to foreign nationals in the United States. It serves to protect all Americans who travel or live

---

[47] U.S. Department of State telegram to all U.S. diplomatic and consular posts abroad concerning consular assistance for American nationals abroad, *supra*, fn. 3.

[48] For example, State Department Spokesman James P. Rubin stated that "[c]onsular notification is no less important to [other countries] than to U.S. nationals outside the United States. We fully appreciate that the United States must see to it that foreign nationals in the United States receive the same treatment we expect for our citizens overseas. We cannot have a double standard." Press Statement by James P. Rubin, Spokesman, U.S. Department of State (Nov. 4, 1998), *available at* http://secretary.state.gov/www/briefings/statements/1998/ps981104.html. State Department Spokesman R. Nicholas Burns captured perfectly the obligation imposed by reciprocity:

> A lot of American citizens who are tourists ... find themselves in trouble, find themselves ill or in prison because they didn't understand the legal system or they came crosswise with the system, and the only people they can turn to for help are American diplomats. So it's critically important to the average American – and millions of Americans travel overseas every year – that they have Americans who can help them when they get into trouble. It happens all the time.

Press Statement by R. Nicholas Burns, Spokesman, U.S. Department of State (Sept. 29, 1995), *available at* http://www.hri.org/docs/statedep/1995/95-09-29.std.html.

abroad."[49] The Executive has further emphasized the importance of reciprocal compliance in its determination that the *Avena* Judgment be given full effect in the state courts. "Consular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international legal obligations to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected."[50]

Robust enforcement of the Vienna Convention is not merely the concern of Executive officials. On the contrary, the law of unintended consequences in this field has been the subject of frequent judicial comment. In *Standt v. City of New York*, for example, the Court observed:

> The United States has repeatedly invoked Article 36 on behalf of American citizens detained abroad who have not been granted the right of consular access.... It is critical for the judiciary to recognize VCCR rights of foreign nationals detained in the United States for the United States to continue its success in invoking the Vienna Convention on behalf of U.S. citizens detained abroad.[51]

---

[49] S. Lynne Walker, *Okla. case pits U.S. against world court*, San Diego Union-Tribune, May 7, 2004 (quoting Mr. Taft's letter to the Oklahoma Pardon and Parole Board), *available at* http://www.signonsandiego.com/uniontrib/20040507/news_n7penalty.html .

[50] Brief of the United States as *Amicus Curiae* at 51, *Medellín v. Dretke*, 125 S.Ct.2d 2088 (2005).

[51] 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001).

Judge Butzner, of the Fourth Circuit Court of Appeals, expressed a similar sentiment during the *Breard* litigation:

> United States citizens are scattered about the world – as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that international law is founded upon mutuality and reciprocity.[52]

In another case, one jurist asked, perhaps only rhetorically:

> Why should Mexico, or any other signatory country, honor the Treaty if the U.S. will not enforce it? The next time we see a *60 Minutes* piece on a U.S. citizen locked up in a Mexican jail without notice to any U.S. government official we ought to remember these cases.[53]

---

[52] *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner J., concurring) (internal quotations omitted); *see also U.S. v. Carillo*, 70 F. Supp. 2d 854, 860 (N.D. Ill. 1999) (Treaty violations not only undermine the 'Law of the Land,' but also international law, where reciprocity is key. If American law enforcement officials disregard, or perhaps more accurately, remain unaware of the notification provision in Article 36, then officials of foreign signatories are likely to flout those obligations when they detain American citizens.").

[53] *Flores v. State*, 994 P.2d 782, 788 (Okla. Crim. App. 1999) (Chapel, J., concurring in result); *see also id.* (court's narrow vision of the Convention "puts U.S. citizens traveling abroad at risk of being detained without notice to U.S. consular officials.").

Organizations with members most affected by a restrictive interpretation of the Convention have also voiced their concerns. The Southern Baptist International Mission Board, for example, oversees 4,200 missionaries and 15,000 volunteers in 130 countries. The president of the organization noted his concerns in urging former Virginia Governor George Allen to commute the sentence of an inmate on Virginia's death row. "I am horrified to think of the potential repercussions in Mexico and other countries, and its potential harm to our missionaries' that could occur because the Commonwealth of Virginia failed to honor the obligations of the Vienna Convention."[54]

The danger to U.S. citizens, though perhaps more pronounced in these turbulent times, does not arise solely from the random acts of rogue states, as a recent incident in China makes plain. Gao Zhan, a sociologist and permanent resident based at American University, was traveling with her young son in China when she was arrested for espionage.[55] She and her son, an American citizen, were held *incommunicado* by China's state security ministry, without notice to the U.S. Embassy. When her husband came to China seeking information, he too was detained and threatened.[56] This incident prompted the House of

---

[54] Frank Green, *Mission Chief Urges Allen to Commute Sentence*, Richmond Times-Dispatch, Sept. 17, 1997, at A1.

[55] *See US Family Detained in China*, BBC News, Mar. 21, 2001, *available at* http://news.bbc.co.uk/1/hi/world/asia-pacific/1233163.stm; Ann Scott Tyson, *Where's Gao? Disappeared in China: 100 days and counting*, Christian Science Monitor, June 5, 2001, *available at* http://www.csmonitorservices.com/csmonitor/archivesearch. jhtml.

[56] *See id.*

Representatives to pass House Resolution 160, unanimously condemning the acts of the Chinese government.[57]

In sum, *amici* stake their argument on the mutually binding obligations of international treaties. Responsible officials in this country have repeatedly expressed the concern that a failure to honor Article 36 presents grave risks to American citizens living and traveling abroad. The Founders expressed a similar concern when they foresaw what has eluded the lower courts in these cases: membership in the international community implies reciprocal obligations and benefits.[58] The obligations at issue here begin with a judicially enforceable individual right of notice, as set out in Article 36. While the reciprocal obligations of Article 36, if honored, imply burdens that this country must bear, they also, by a like reciprocity, stand to benefit its citizens most. We urge the Court to recognize those obligations today.

---

[57] H.R. Res. 160, 107th Cong. (2001).

[58] *The Federalist No. 64*, at 392 (Clinton Rossiter ed., 2003):

> Others, though content that treaties should be made in the mode proposed, are averse to their being the SUPREME laws of the land. They insist, and profess to believe, that treaties like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Daniel C. Malone
Counsel for *Amici Curiae*[59]

Dechert LLP
30 Rockefeller Plaza
New York, NY 10112
(212) 698-3500
daniel.malone@dechert.com

Dated: New York, NY
January 21, 2005

[59] Application for membership to the bar of the Supreme Court of the United States pending.

Supreme Court, U.S.
FILED
DEC 22 2005
OFFICE OF THE CLERK

No. 05-51

IN THE

Supreme Court of the United States

MARIO BUSTILLO,

Petitioner,

v.

GENE JOHNSON,
Director, Virginia Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL S. GRECO*
President
American Bar Association
321 N. Clark Street
Chicago, IL 60610
(312) 988-5000

* *Counsel of Record*

Counsel for Amicus Curiae

Of Counsel:

JEFFREY L. BLEICH
MICHELLE T. FRIEDLAND

198555

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The International Court of Justice ruled in *LaGrand* and *Avena* that procedural default rules should not be used to block United States courts' review and reconsideration of the convictions and sentences of foreign nationals who were denied their rights to consular notification and access to consular services under Article 36 of the Vienna Convention. In light of those decisions, Amicus will discuss the following questions:

1. Does the withdrawal from the Optional Protocol to the Vienna Convention affect the implementation of the *LaGrand* and *Avena* holdings in the United States?

2. Does the requirement that courts in the United States give Article 36 its full effect prohibit state courts from using procedural bars to deny claims of defects in consular notification and access on collateral review of foreign national defendants' convictions and sentences?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	4
ARGUMENT	9
I. Giving effect to the ICJ's authoritative interpretation of Article 36 in *LaGrand* and *Avena* in the context of state habeas proceedings is necessary to ensure compliance with the guarantee of consular access to which the United States commit ed by ratifying the Vienna Convention.	9
II. The ICJ's authoritative interpretations of Article 36 in *LaGrand* and *Avena* should endure beyond the post-judgment decision to withdraw from the Optional Protocol.	13
A. The decisions of the ICJ issued prior to the withdrawal from the Optional Protocol continue to define the United States' obligations under the Vienna Convention.	14

Contents

Page

B. At a minimum, *Avena* Controls this case because the withdrawal from the Optional Protocol does not have retroactive effect. 18

C. This Court has expressed a willingness to defer to the expertise of the ICJ. 20

III. State habeas provides an appropriate forum for giving effect to the ICJ's ruling that the use of procedural bars to dispose of consular notification claims violates the Vienna Convention. 21

A. The balance of interests underlying procedural default rules weighs against their application when treaty rights are at stake. 22

B. State collateral proceedings are an appropriate forum for resolving the unique problems presented by consular notification defects. 24

C. The President has determined that state collateral proceedings are well-suited for implementing the *Avena* Judgment. . . . 26

D. Easing restrictions on the use of procedural bars in collateral proceedings would not place a significant burden on state courts. 27

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

Federal Cases:

American Ins. Ass'n v. Garamendi,
539 U.S. 396 (2003) 26

Arizona v. Fulminante,
499 U.S. 279 (1991) 28

Baker v. Carr,
369 U.S. 186 (1962) 11

Bonner v. City of Pritchard,
661 F.2d 1206 (11th Cir. 1981) 17

Breard v. Greene,
523 U.S. 371 (1998) 20, 24

Claflin v. Houseman,
93 U.S. 130 (1876) 12

Ehrlich v. Am. Airlines, Inc.,
360 F.3d 366 (2d Cir. 2004) 19

Goldwater v. Carter,
444 U.S. 996 (1979) 14

Hines v. Davidowitz,
312 U.S. 52 (1941) 12

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 10

Massaro v. United States,
538 U.S. 500 (2003) 8, 25

Cited Authorities

Page

Medellin v. Dretke,
125 S. Ct. 2088 (2005) ..... *passim*

Missouri v. Holland,
252 U.S. 416 (1920) 28, 29

Reed v. Farley,
512 U.S. 339 (1994) 10

Reid v. Covert,
354 U.S. 1 (1957) 8, 11

Society for the Propagation of Gospel in Foreign Parts v. Town of New Haven,
21 U.S. 464 (1823) 19

Tafflin v. Levitt,
493 U.S. 455 (1990) 12

Teague v. Lane,
489 U.S. 288 (1989) 11

United States v. Dion,
476 U.S. 734 (1986) 11

United States v. Griffin,
699 F.2d 1102 (11th Cir. 1983) 25

United States v. Louisiana,
470 U.S. 93 (1985) 21

United States v. Maine,
475 U.S. 89 (1986) 21

Cited Authorities

Page

United States v. Mendoza,
464 U.S. 154 (1984) 15, 16

United States v. Nixon,
418 U.S. 683 (1974) 27

United States v. Pink,
315 U.S. 203 (1942) 12

United States v. Yousef,
327 F.3d 56 (2d Cir. 2003) 19

Wainwright v. Sykes,
433 U.S. 72 (1977) 23

International Cases:

Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.),
2004 I.C.J. 12 (March 31) ..... *passim*

Corway v. Independent Newspapers (Ireland) Limited,
[1999] 4 I.R. 484 (Ir.) 17

Fisheries Case (U.K. v. Norway),
1951 I.C.J. 116 (Dec. 18) 21

LaGrand Case (F.R.G. v. U.S.),
2001 I.C.J. 466 (June 27) ..... *passim*

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.),
1986 I.C.J. 14 (June 27) 15

Cited Authorities

Page

United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1979 I.C.J. 7, 1980 I.C.J. 3 ..... 13, 14

U.S. Constitution and Federal Statutes:

U.S. Const. art. VI 8

28 U.S.C. § 2253 10

Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 17

Treaties and International Statutes:

Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325 ..... 4, 5

Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055 20

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 ..... *passim*

Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, 1155 U.N.T.S. 331 ..... 18, 19

Cited Authorities

Page

Law Reviews and Treatises:

Robert Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493 (1995) 21

Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004) 21

Restatement (Second) of Conflicts of Laws § 35(2) (1971) 18

Other Authorities:

7 Foreign Affairs Manual § 426.2-1 (2004), *available at* http://foia.state.gov/masterdocs/07fam/07m0420.pdf 13

72 REPORTS OF THE AMERICAN BAR ASSOCIATION 102-03 (1947) 2

ABA Guideline 10.6 – Additional Obligations of Counsel Representing a Foreign National (2003) 2

ABA House of Delegates Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 3

ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(c) (3d ed. 1993) 3

Cited Authorities

Page

ABA Standards for Criminal Justice: Providing Defense Services Standards, Standard 5-1.2 (3d ed. 1992) 3

Declaration by the President of the United States of America August 14, 1946 Respecting Recognition by the United States of America of the Compulsory Jurisdiction of the International Court of Justice, 61 Stat. 128 (1946) 16

Brian Knowlton, *Execution Pits Mexico Against U.S. – Fox Echoes World On Death Penalty*, INT'L HERALD TRIB., Aug. 16, 2002 23

Letter from Condoleeza Rice, U.S. Sec'y of State, to Kofi Annan, United Nations Sec'y General (Mar. 7, 2005) 14

Medellin v. Dretke, Brief for the United States as amicus curiae 22

Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. E, 91st Cong., 1st Sess. (1969) 4

United States Department of State, *Announcement: All Consular Notification Requirements Remain in Effect, available at* http://travel.state.gov/news/news_2155.html 9

Cited Authorities

Page

United States Department of State, Bureau of Consular Affairs, *Assistance to U.S. Citizens Arrested Abroad, available at* http://travel.state.gov/travel/tips/emergencies/emergencies_1199.html 5

Mark Warren, Human Rights Research, *Foreign Nationals and the Death Penalty in the United States*, May 28, 2005, *available at* http://www.death penaltyinfo.org article.php?did=198&scid=31 9

INTEREST OF AMICUS CURIAE[1]

Pursuant to this Court's Rule 37.3, *amicus curiae* American Bar Association ("ABA" or "*amicus*") respectfully submits this brief in support of the position that the United States' obligations under the Vienna Convention, part of the "supreme Law of the Land," preclude states from using procedural bar rules to avoid hearing Article 36 claims on collateral review of foreign national defendants' convictions and sentences.

STATEMENT OF INTEREST

The ABA is the world's largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 405,000 attorneys spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2]

Among the ABA's goals are "promot[ing] meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition" and "advanc[ing] the rule of law in the world."

---

1. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

2. Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.